Supreme Court, U.S.
FILED

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

JUDY ANN SHOWERS,
Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

JUDY ANN SHOWERS,
Petitioner

No. 468 M.D. Allocatur Docket 1996

Order

AND NOW this 27th day of November, 1996, the petition for allowance of appeal is hereby DENIED.

ORDER ENTERED: November 27, 1996.

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

JUDY ANN SHOWERS,

Appellant

No. 1378 Philadelphia, 1995

BEFORE: McEWEN, P.J., SAYLOR AND MONTEMURO, JJ.

OPINION BY MONTEMURO, J.:

This appeal arises from Appellant Judy Ann Showers' conviction for first degree murder following a jury trial before the Honorable Barry F. Feudale of the Court of Common Pleas of Northumberland County. The mandatory sentence of life imprisonment was imposed. Now represented by new counsel, Appellant brings this appeal. We affirm.

On September 2, 1992, state police Trooper Robert McBride responded to the scene of an apparent suicide at the residence of Appellant and her husband,

Delbert Showers, whose body was found lying on their couch. Norman Showers, the deceased's brother, had already arrived on the scene and discovered what appeared to be a suicide note under the body. The note explained the deceased's reasons for committing suicide and what drugs he took to accomplish it. The deceased died of an oral overdose of a mixture of Serax, an anti-depressant drug, and liquid morphine. The Serax was obtained by prescription, while the morphine had been taken from Helen Wolfe, a friend of the Showers and the former lover of the deceased.

On the day of her husband's death, Appellant, a licensed practical nurse, had been alone in the house with him. During Trooper McBride's investigation, the police determined that the note was not written by the deceased. In February of 1993, Trooper McBride again interviewed Appellant who

admitted that she wrote the note because she feared she would be accused of killing her husband. Based upon inconsistencies in her story and other information which she provided, Appellant was charged with first degree murder.

At trial, the Commonwealth introduced evidence of Appellant's motive for the killing. At the time of his death, the deceased was romantically involved with Sylvia Knecht, the younger sister of Helen Wolfe. Appellant also knew of this affair. Years earlier, Appellant had also discovered his affair with Helen Wolfe. In addition, there was evidence that Appellant herself had in the past been involved in extramarital relations. There were also indications of a financial motive, evidence to the effect that although the deceased was financially well-off, he was "tight" with money.

Appellant attempted to establish that the death was a suicide by evidence that the deceased had sought treatment for depression in the past, and that he had discussed suicide.

After a one-week trial, the jury found Appellant guilty of murder in the first degree. On appeal, Appellant raises eight issues, which have been edited for clarity:

1. Was the evidence insufficient to sustain the verdict because the Commonwealth failed to prove beyond a reasonable doubt that Delbert Showers was murdered by Appellant as opposed to having committed suicide or, alternatively, was the verdict against the weight of the evidence?

2. Did the trial court err in permitting the Commonwealth to introduce evidence of Appellant's bad reputation for truthfulness?

3. Was trial counsel ineffective for not extensively cross-examining Dr. John Hume,

the Commonwealth's expert witness, who testified that the deceased was not a suicide risk?

4. Did the trial court err in admitting allegedly irrelevant, remote, and highly prejudicial evidence that Appellant had instructed Diane Showers, Appellant and the deceased's daughter, to administer medication to the deceased without his knowledge several years before his death?

5. Did the trial court err in denying a motion for a mistrial when Trooper McBride testified that he felt there was a reasonable doubt that the deceased committed suicide?

6. Did the trial court err in: allowing the Commonwealth to grant limited use immunity to Diane Showers solely to impeach her testimony by a later witness; b) allowing the Commonwealth to treat her as a hostile witness; c) limiting the cross-

examination of her to matters granted in the use immunity; and d) not compelling the Commonwealth to give her full use immunity for all her testimony or preclude her from testifying pursuant to her invocation of her right against self incrimination?

7. Did the trial court err in allowing Janette Andrews to testify that she was called only to impeach Diane Shower and her testimony, which was hearsay, went beyond the scope of the offer of proof and the grant of immunity?

8. Did the trial court err in allowing the Commonwealth to cross-examine the defense forensic psychiatrist concerning a report that the deceased discovered that Appellant was having an affair in the mid-1970's?

1. Sufficiency and Weight of the Evidence

Appellant's first point of error is that the evidence was insufficient to

sustain a first degree murder conviction. She points to evidence that the deceased had a long history of chronic depression; had been hospitalized and under medical treatment for depression; had told several people shortly before his death that he intended to commit suicide; and was a high risk to commit suicide according to a forensic psychiatrist.

In examining a sufficiency of evidence claim, we must determine whether the evidence and all reasonable inferences from it, viewed in a light most favorable to the Commonwealth as verdict winner, were sufficient to establish all the elements of the crimes charged beyond a reasonable doubt. Commonwealth v. Zimmick, 539 Pa. 548, 554, 653 A.2d 1217, 1220 (1995). To prove murder in the first degree, the Commonwealth must show that a human being was unlawfully killed, that the accused

committed the killing, and that she did so in an intentional, deliberate, and premeditated manner. Commonwealth v. Paolello, ___ Pa.___, ___, 665 A.2d 439, 448 (1995). The key element distinguishing first degree murder from other degrees of criminal homicide is the presence of a willful, premeditated, and deliberate intent to kill. Id.

Within this first issue, Appellant also challenges the weight of the evidence. The weight of the evidence is exclusively for the finder of fact who is free to believe all, some, or none of the evidence. Commonwealth v. Simmons, 541 Pa. 211, 229, 662 A.2d 621, 630 (1995), cert. denied, 116 S.Ct. 945 (1996). In addition, questions of credibility of witnesses are within the factfinder's exclusive province. Id. We will only reverse a verdict if it is so contrary to the evidence to shock our sense

of justice. Id.

In addressing this issue, the trial court Opinion thoroughly examines the evidence supporting the first degree murder conviction. Therefore, to that extent, we adopt its Opinion as our own. After reviewing the parties' respective briefs, the record and notes of testimony, and the trial court's Opinion, we hold that there was sufficient evidence to convict Appellant of first degree murder. Furthermore, we hold that the verdict was not against the weight of the evidence as it does not shock our sense of justice.

In response to Appellant's contention that trial counsel was ineffective for not raising a weight challenge before the trial court, we note that the contention is moot because the trial court did address the weight of the evidence.

2. Evidence of Appellant's Reputation for

Truthfulness

Appellant's second issue is that the trial court erred in allowing the Commonwealth to present three witnesses who testified to her reputation for dishonesty. Appellant alleges three errors concerning the character evidence: first, although she testified at trial, she did not place her reputation for honesty at issue; second, the character evidence was based on remote knowledge; and third, one witness, to Appellant's prejudice, testified beyond the scope of character evidence.

The admission of evidence is a matter reserved for the trial court whose decision, absent an abuse of discretion, we will not disturb. Commonwealth v. Williams, 541 Pa. 85, 94, 660 A.2d 1316, 1321 (1995), cert. denied, 116 S.Ct. 717 (1996). Appellant contends that a defendant in a criminal case does not place her reputation for honesty at

issue merely by taking the stand. She alleges that the trial court had a "serious misunderstanding" of character reputation evidence in a criminal trial. However, it is Appellant who confuses the character evidence issue. The error in Appellant's argument manifests itself in her contradictory contentions that: 1)a defendant does not place her credibility at issue by testifying at trial; 2)crimen falsi convictions are admissible to impeach the credibility of a defendant who testifies; and 3) evidence of a testifying defendant's reputation for untruthfulness cannot be used to impeach credibility. Although no case directly holds that a defendant who takes the stand may have her credibility impeached by reputation evidence, a review of case law clearly indicates that such impeachment is permissible.

In Commonwealth v. Scoleri, 432 Pa.

571, 248 A.2d 295 (1968), vacated, Scoleri v. Pennsylvania, 408 U.S. 934 (1972), our Supreme Court stated, "Where a defendant in a criminal case takes the witness stand in his own defense he occupies the same status as any other witness and his credibility is in issue." 432 Pa. at 579, 248 A.2d at 299; see also Leonard Packel & Ann Bowen Poulin, Pennsylvania Evidence § 608.1 (1987); 81 Am.Jur.2d Witnesses § 967 (1992). The reason is that "[i]f a defendant offers himself as a person worthy of belief, the jury has a right to know what kind of man he is -- to aid in assessing his credibility." Commonwealth v. Butler, 405 Pa. 36, 47, 173 A.2d 468, 474 (1961), cert. denied, 368 U.S. 945 (1961).

During her testimony, Appellant recited her own version of the events surrounding her husband's death. When confronted with the testimony of other witnesses, she stated

that the other witnesses' recollection of the facts were incorrect. It is clear that by testifying to a different version of the events surrounding the death, and by claiming that the other witnesses' testimony was incorrect, Appellant placed her credibility at issue.

Even though she claims that a defendant does not put her credibility at issue by testifying at trial, Appellant nevertheless concedes that crimen falsi convictions are admissible to impeach the credibility of a defendant who takes the stand in her own defense. However, she argues, without supporting authority, that the law is "equally clear" that evidence of a defendant's reputation for truthfulness may not be introduced unless specifically placed in issue. Thus, inherent in her argument is that evidence of crimen falsi crimes is different from reputation evidence.

However, Appellant fails to differentiate the two methods.

Contrary to Appellant's position, it has long been the law of this Commonwealth that a witness's credibility may be attacked by showing her bad reputation for truth and veracity. Commonwealth v. Fowler, 434 Pa.Super. 148, 150, 642 A.2d 517, 517 (1994), allocatur denied, 539 Pa. 688, 653 A.2d 1227 (1994) (citing Commonwealth v. Payne, 205 Pa. 101, 104, 54 A. 489, 491 (1903)). In Butler, the court stated, "[a defendant's] previous record is admissible for [impeaching credibility] just the same as testimony of prior reputation for veracity is evidence for the jury's consideration." 405 Pa. at 47, 173 A.2d at 474. See also Fowler, 434 Pa.Super. 148, 642 A.2d 517 (1994) (recognizing that a defendant's good reputation for truth and veracity may be introduced when he was

"impeached by evidence of bad reputation for truth and veracity."); Packel & Poulin, supra, § 608.1.

Based on our review of the relevant case law, we can discern no distinguishing factor that would allow the use of crimen falsi convictions to impeach a defendant's credibility, yet bar the use of evidence of reputation for veracity for the same purpose. Further, Appellant has provided no reason why a defendant should be treated any differently than any other witness with regard to issues of credibility; upon testifying at trial, a defendant, like any other witness, places her credibility at issue. That credibility may be impeached by prior crimen falsi convictions and/or by evidence of the defendant's reputation for untruthfulness. Thus, the trial court did not abuse its discretion in allowing the Commonwealth to introduce evidence of this

sort.

Appellant's next allegation of error concerning the evidence of her reputation for truthfulness is that it was too remote in time to be admissible. The trial commenced on March 14, 1994. Diane Campbell testified that she knew Appellant's reputation from 1979 to the mid-1980's. Michelle Steinbacher knew Appellant's reputation from 1981 to 1985. The final reputation witness, Gloria Harbough, knew Appellant's reputation in 1989. The community from which the reputation was garnered was a hospital in which the witnesses worked, and where Appellant was employed from 1979 until 1990.

As stated above, the admission of evidence is at the trial court's discretion. It has long been held that evidence of reputation for truthfulness must relate to the time of trial.

> "When at the trial of a cause the character of a witness is shown in order to affect his credibility the question is whether he then told the truth. It is his character at the time he testifies that is under investigation, and this is to be established by evidence of his general reputation at that time. . . ."

Smith v. Hine, 179 Pa. 203, 206-07, 36 A. 222, 222 (1897); see also Miller v. Miller, 187 Pa. 572, 41 A. 277 (1898); Commonwealth v. Hansell, 185 Pa.Super. 443, 137 A.2d 816 (1958). The reason for this is that it would be unfair to judge a person, whether positively or negatively, on her remote reputation which may no longer be applicable or true.

Although recent case law does not

provide specific examples of time frames by which to measure remoteness, our Supreme Court has addressed the issue in the past. See Miller, 187 Pa. 572, 41 A. 277 (1898) (reputation evidence related to period four years before trial too remote); Smith, 179 Pa. 203, 36 A. 222 (1897)(two years too remote). However, in deciding whether evidence of a defendant's prior bad acts is too remote, "no rigid rule can be formulated for determining when such evidence is no longer relevant. . . . The trial court's determination will not be disturbed absent an abuse of discretion." Commonwealth v. Ulatoski, 472 Pa. 53, 63, 371 A.2d 186, 191-92 (1977). Even though Ulatoski did not address the timeliness of reputation evidence, the same principles are applicable to the immediate issue. See Commonwealth v. White, 271 Pa. 584, 115 A. 870 (1922) (whether reputation evidence remote in

particular circumstance is at trial court's discretion).

In White, the court recognized that twenty year old evidence of a defendant's reputation for bad character was admissible when coupled with proof that the bad character continued at all times to the date of trial. Id. at 587, 115 A. at 871. Standing alone, the twenty year old reputation evidence was not admissible. Id. at 588, 115 A. at 871. However, accompanied by more recent bad character reputation evidence, the remote reputation evidence was proper to show that the defendant had a continuously bad reputation. Id.

Similarly, the admission of character evidence in the instant case evidences Appellant's continuous reputation for dishonesty. Several witnesses testified that from approximately 1979 until 1989, Appellant had a reputation for dishonesty

Thus, the Commonwealth established an on-going, continuous reputation for dishonesty, corroborated by more than one person and spanning eleven years. This is not a case in which the only reputation evidence is one witness who testified that she knew the defendant for a short time many years ago.

Based upon the trial court's discretion in this matter, there is no bright line to determine exactly when reputation evidence is too remote. In addition, remoteness is often a question of weight, not admissibility. Ulatoski, 472 Pa. at 62, 371 A.2d at 190-91 (citing 2 J. Wigmore, Evidence 396 (3rd ed. 1940)). We note that in closing argument, Appellant attacked the weight of the evidence by reminding the jury of its timeliness.

Further, the gap between the most recent evidence and the death of Appellant's husband was only three years. At trial,

numerous statements made by Appellant at the time of the death were admitted at trial. Thus, her credibility at the time she made the statements was also in issue. Because the reputation evidence ranged from five years before trial to only three years before the crime charged, we hold that the reputation evidence was not too remote.

Appellant also takes exception to the testimony of Michelle Steinbacher that Appellant "wasn't trusted by my staff," in response to a question concerning Appellant's reputation for truthfulness. Appellant immediately objected. The trial court sustained the objection and had the answer stricken from the record. In light of the fact that the answer was brief and was stricken from the record, Appellant has not established how the testimony prejudiced her. Moreover, Appellant did not seek a curative instruction or a mistrial. See

Commonwealth v. Jones, 501 Pa. 162, 460 A.2d 739 (1983) (issue waived for failure to request curative instruction or mistrial after objection sustained). Thus, this argument is without merit.

Appellant's final argument concerning the reputation evidence is addressed to the testimony of Gloria Harbough, who stated that she fired Appellant from the hospital in 1990. Appellant contends that this specific evidence of her reputation should not have been admitted. We note that Appellant raised no objection at trial to this testimony.

As the trial court correctly pointed out, Harbough testified for two purposes. One was to offer reputation evidence, and the other was to rebut Appellant's claim that she left the hospital in 1990 in order to further her education. Hence, Harbourgh's testimony was proper rebuttal

evidence. We hold that the trial court did not abuse its discretion in admitting this evidence.

3. Trial Counsel's Cross-examination of Dr. Hume

Appellant's third point of error is that trial counsel was ineffective for not cross-examining Dr. John Hume more extensively. The Commonwealth called Dr. Hume to testify as an expert in forensic psychiatry. He testified, contrary to Appellant's expert witness, that he did not believe the deceased was at a high risk for suicide at the time of his death. On cross-examination, Appellant's trial counsel inquired as to who had hired him to testify, the length of time period he had been involved in the case, the absence of a written report, and the fact that he was not a board certified forensic psychiatrist.

In reviewing a claim of ineffectiveness

of counsel, it is Appellant's burden to show that the claim is of arguable merit, that counsel's action or inaction did not have a reasonable basis designed to effectuate her interests, and that counsel's action or inaction was prejudicial. Paolello, ___ Pa. at ___, 665 A.2d at 454. The issue here is whether counsel's cross-examination had a reasonable basis intended to effectuate her interests, and we agree with the trial court that there was such a basis for counsel's actions.

In reviewing trial counsel's performance, we will not find ineffectiveness for failure to choose the best trial tactics or strategy to effectuate Appellant's interests. Rather, the proper inquiry is whether counsel's actions or lack thereof had some reasonable basis. Commonwealth v. Pierce, 537 Pa. 514, 524, 645 A.2d 189, 195 (1994) (citation omitted).

If so, counsel is deemed effective. Id.

Trial counsel's decision to limit his cross-examination did have some reasonable basis. Appellant presented her own expert witness, Dr. Harry A. Doyle, a certified forensic psychiatrist, who testified that in his expert opinion the deceased was at risk for suicide at the time of his death. Thus, the persuasiveness of the competing experts rested on such factors as credibility, familiarity with the case, and qualifications. During cross-examination, trial counsel elicited the fact that Dr. Hume was being paid by the Commonwealth, had only been on the case three to four weeks, did not make a written report, and was not board certified. In addition, an extended cross-examination might have allowed Dr. Hume to restate his opinion regarding the deceased's risk of suicide. Thus, trial counsel's limited cross-examination of Dr.

Hume had some reasonable basis designed to effectuate Appellant's interest.

4. Evidence of Appellant's Prior Bad Acts

Appellant fourth argument concerns evidence elicited from Bonnie Frey, who lived with the Showers during 1985 and 1986, that Appellant instructed Diane Showers, the daughter of Appellant and the deceased, to place medicine in the deceased's coffee without his knowledge. Appellant contends that this evidence is irrelevant and extremely prejudicial because the events are too remote in time, and that counsel was ineffective for failing to object to its admission.

Appellant concedes that evidence of a prior course of conduct is relevant. Her only point of contention is that the incidents were too remote in time to be admissible. In Ulatoski, our Supreme Court discussed the admission of evidence of prior

relations between a defendant and a homicide victim:

"evidence concerning the nature of the marital relationship is admissible for the purpose of proving ill will, motive or malice. This includes, in particular, evidence that the accused physically abused his or her spouse . . . . [I]t is generally true that remoteness of the prior instances of hostility and strained relations affects the weight of that evidence and not its admissibility. . . . [N]o rigid rule can be formulated for determining when such evidence is no longer relevant."

472 Pa. at 60-61, 371 A.2d at 190-91 (citations omitted). In deciding when evidence of other crimes or bad acts is too remote, the importance of the time period is inversely proportional to the similarity of the crime or acts. Commonwealth v. Miller, 541 Pa. 531, 549, 664 A.2d 1310, 1319

(1995), cert. denied, 116 S.Ct. 932 (1996). Remoteness is a question best left to the discretion of the trial court. Ulatoski, 472 Pa. at 63, 371 A.2d at 191-92 (citation omitted).

In the instant case, the prior acts and the death of the deceased occurred approximately six to seven years apart. The similarity between the acts described by Bonnie Frey and the crime charged are strikingly close. Both involved the administration of prescription drugs to the deceased in the same manner without his knowledge. Frey testified that although Appellant explained having placed the medication in the coffee in terms of the deceased's refusal to take what had been prescribed for him, it was often done because Appellant wanted to go shopping. Having been made drowsy by the medication, the deceased could not complain about the

shopping trips. Therefore there can be no contention that Appellant acted as she did for her husband's benefit. Moreover, the prior acts occurred on more than one occasion.

Based on the foregoing, any objection to the evidence of Appellant's prior acts in drugging the deceased would have been meritless, and counsel will not be deemed ineffective for failing to raise a meritless argument. Paolello, ____ Pa. at ____, 665 A.2d at 454. The evidence was relevant to show the nature of the relationship between Appellant and the deceased, and to rebut her claim that the death was a suicide. Any remoteness affected the weight of the evidence, not its admissibility.

5. Trooper McBride's Testimony

Appellant's fifth contention is that the trial court erred in denying a mistrial when Trooper McBride, the investigating

officer, was asked about the investigation into the death of Appellant's husband. In response, he stated, "Well, in December of -- now, like I say, my doubts, my concerns, my suspicions have been growing and -- but there's just -- I don't want to jump to a conclusion. But in December I reached the point that I felt there was a reasonable doubt that a suicide occurred." Appellant immediately objected and asked for a mistrial. The trial court denied the motion, but did give the jury a curative instruction that the use of "reasonable doubt" was irrelevant, and that the court would instruct the jury at the end of the trial on the proper use of the term.

Whether a mistrial is required is at the discretion of the trial court. Commonwealth v. Johnson, ___ Pa.___, ___, 668 A.2d 97, 103 (1995). A mistrial is only warranted where the incident is of such

nature as to deny the defendant a fair trial. Id. Additionally, a jury is presumed to follow the instructions of the trial court. Commonwealth v. Jones, ___ Pa. ___, ___, 668 A.2d 491, 503-04 (1995). A curative instruction was immediately given. Furthermore, the remark was not intentionally elicited nor exploited by the Commonwealth. We hold that the trial court did not abuse its discretion in denying a mistrial.

6. Limited Use Immunity for Diane Shower

Appellant's sixth argument revolves around the Commonwealth's grant of limited use immunity for Diane Showers in order to allow her to testify concerning certain events which occurred approximately two months before the murder. Within this issue are three arguments: 1) the grant of immunity did not comport with 42 Pa.C.S.A. § 5947; 2) the Commonwealth was erroneously

allowed to treat Diane as a hostile witness; and 3) Appellant was erroneously prevented from cross-examining her on any matters beyond the scope of the limited grant of immunity.

Appellant does not have standing to allege that the grant of limited use immunity did not comply with the statutory scheme. Commonwealth v. Schomaker, 293 Pa.Super. 78, 87, 437 A.2d 999, 1003 n. 3 (1981) (citing Commonwealth v. Russell, 225 Pa.Super. 133, 136-37, 310 A.2d 296, 298 (1973)), rev'd on other grounds, 501 Pa. 404, 461 A.2d 1220 (1983)). The section addressing requests and issuance of an immunity order reads:

"The Attorney General or a district attorney may request an immunity order from any judge of a designated court, and that judge shall issue such an order, when in the judgment of the Attorney General or district

attorney:

1) the testimony or other information from a witness may be necessary to the public interest; and

2) a witness has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination." 42 Pa.C.S.A. § 5947(b).

Appellant contends that the Commonwealth did not satisfy the requirement that the immunized testimony be necessary to the public interest. Whether a grant of immunity was proper is an issue that concerns the rights of the person who is ordered to testify pursuant to the grant. Therefore, only that person may contest the necessity of the testimony or information to the public interest.

Appellant's next two arguments on this issue concern the interrogation of Diane

Showers. The trial court allowed the Commonwealth to treat the witness as hostile, and limited Appellant's cross-examination of her to matters related to the limited use immunity.

The scope and manner of cross-examination is left to the discretion of the trial court whose decision will not be disturbed absent an abuse of that discretion. Commonwealth v. Wilson, 538 Pa. 485, 506, 649 A.2d 435, 445 (1994), cert. denied, 116 S.Ct. 145 (1995). The trial court allowed the Commonwealth to treat Diane as a hostile witness based upon her relation to Appellant, her invocation of the right not to incriminate herself, and her refusal to cooperate with the state police. We find no error in the court's decision. See Commonwealth v. Settles, 442 Pa. 159, 275 A.2d 61 (1971) (Commonwealth could cross-examine its own witness who was

sister-in-law and associate of defendant).

Contrary to Appellant's claim, the trial court did not err in limiting Appellant's cross-examination of Diane to matters related to the immunity. The cross-examination was restricted to the scope of the Commonwealth's examination. Moreover, the court gave Appellant the option of calling Diane at a later point if the need arose. Finally, Appellant does not indicate what she would have explored on cross, now how she was prejudiced by any limitation placed on her inquiries. The trial court did not abuse its discretion in its rulings concerning Diane's testimony.

7. Janette Andrews' Testimony

Appellant's seventh allegation of error pertains to the testimony of Janette Andrews, a friend of Diane's. The Commonwealth attempted to establish that approximately two months before the

deceased's death, Appellant called Diane late at night and asked her to find out if the deceased was at Sylvia Knecht's house. Diane testified that she, rather than Appellant, had initiated the conversation, and that she went to Sylvia Knecht's house not at Appellant's request, but to look for the deceased because he had tried to phone her earlier.

Andrews was with Diane that evening, and her testimony contradicted Diane's version of events. According to Andrews, Appellant had telephoned Diane, not the other way around. Andrews testified that Diane told her that Appellant reported seeing the deceased's car parked at Sylvia Knecht's house earlier in the day, and that Appellant wanted Diane to discover whether the car was still there. Andrews also testified that Diane called her two weeks prior to trial and commented that their

versions of what had transpired were inconsistent.

Appellant contends that Andrews' testimony was erroneously admitted because the Commonwealth was allowed to impeach its own witness, Diane, by eliciting a different version of the events to which Diane testified. Appellant also alleges that Andrews' testimony contained inadmissible hearsay. Furthermore, Appellant contends that it was impermissible for Andrews to testify that Diane called her two weeks before trial to tell her that their versions of the event were different, because the testimony went beyond the scope of the Diane's [sic] limited immunity and the Commonwealth's offer of proof for Andrews.

Again, our standard of review on matters involving the admission of evidence is whether the trial court abused its discretion. The court held that the

Commonwealth did not intend to impeach Diane, and only called Andrews after Diane had testified to a different version of the events of the evening in question. The court also held that Andrews' testimony concerning Diane's telephone call two weeks before the trial was not hearsay because it was used for purposes of impeachment, nor did it exceed the scope of Diane's limited immunity or the offer of proof because the conversation pertained to events about which Diane had already testified.

We first note that the Commonwealth did not impeach Diane by eliciting from Andrews a different version of the events of the night in question. Our Supreme Court has explicitly held, "[I]t is well settled a party may contradict his own witness by independent evidence showing facts to be different from those testified to by such witness[.] . . . Such rule does not violate

the general rule that one may not impeach his own witness because to contradict is not to impeach." Commonwealth v. Myrick, 468 Pa. 155, 164, 360 A.2d 598, 602 (1976) (citations omitted).

Appellant's contention that Andrews' testimony contained inadmissible hearsay also fails. Although Andrews did repeat what Diane told her, the trial court correctly noted that the out-of-court statement was not used for the truth of the matter, but to impeach Diane. It is well-settled that a witness may be impeached by a prior statement as long as the statement is inconsistent with her trial testimony. Commonwealth v. Brown, 538 Pa. 410, 427, 648 A.2d 1177, 1185 (1994). It is clear in the instant case that what Diane said to Andrews on the night in question was inconsistent with her trial testimony.

Appellant claims that the Commonwealth

could not impeach its own witness with prior inconsistent statements. Commonwealth v. Grimes, 436 Pa.Super. 535, 545, 648 A.2d 538, 540 (1994). The element of surprise is not an absolute requirement. "Pennsylvania courts have frequently permitted parties to contradict or impeach witnesses called by them without a strict requirement of surprise when the interests of truth and justice seem to require it." Commonwealth v. Brady, 510 Pa. 123, 135, 507 A.2d 66, 72 (1986) (quoting Commonwealth v. Gee, 467 Pa. 123, 137, 354 A.2d 875, 881 (1976)).

In response to Appellant's contention that the Commonwealth sought to call Diane as a hostile witness based on foreknowledge of the evidence she would give, we note, as stated above, that she was treated as a hostile witness for reasons other than the substance of her proposed testimony. Moreover, the trial court expressly found

that the Commonwealth did not know what Diane would say on the stand. Additionally, Diane's testimony was detrimental to the Commonwealth's case as it directly contradicted events related by Andrews. We hold that based upon the interests of "truth and justice," the trial court did not abuse its discretion in allowing the Commonwealth to impeach Diane with Andrews' testimony.

Further, Andrews' testimony that Diane called her two weeks before the trial was not improperly admitted. The trial court allowed this evidence on the ground that it impeached Diane, and that it was not outside the scope of Diane's limited immunity because the conversation concerned events about which Diane had already testified.

Even if the testimony concerning the telephone call was inadmissible, Appellant has not shown how it prejudiced her. Andrews did not testify that Diane told her

to change her story or to lie. Rather, she merely testified that during their conversation, Diane said that Appellant did not know about the trip to Sylvia Knecht's house on the evening in question, and that their recollections of that night were different. Given the fact that Andrews had already contradicted Diane's version of events, this evidence was merely cumulative of other, properly admitted evidence. Therefore, we hold that even if the trial court abused its discretion in allowing Andrews' testimony to be admitted into evidence, Appellant has not shown sufficient prejudice requiring a new trial.

8. The Commonwealth's Cross-examination of Dr. Doyle

Finally, Appellant argues that the trial court erred in allowing the Commonwealth to cross-exam [sic] Dr. Doyle, the defense's forensic psychiatrist, about

a report that Appellant was having an affair during the mid-1970's. She contends that the evidence was inadmissible hearsay, highly prejudicial, and too remote in time. Appellant alleges that a cautionary instruction should have been given.

As previously stated, the scope and limits of cross-examination are at the trial court's discretion. Moreover, the trial court told Appellant that she could request a cautionary instruction. No request was ever made. Finally, the Commonwealth properly explored Dr. Boyle's basis for his expert opinion. Dr. Boyle relied upon events which occurred as early as 1972. In addition, there were numerous references to Appellant's extramarital affairs already in evidence. Thus, the hearsay claim is unsupported and meritless, and the trial court did not abuse its discretion in allowing the Commonwealth to cross-examine

Dr. Boyle concerning Appellant's alleged affair.

Affirmed.

McEWEN, PRESIDENT JUDGE, DISSENTS.

FILED: June 20, 1996.

IN THE COURT OF COMMON PLEAS

NORTHUMBERLAND COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

JUDY ANN SHOWERS,

Defendant

Criminal Law Division

No. CR-93-402

OPINION

Feudale, J.

On March 23, 1994, after a one week trial, a jury found the Defendant, Judy Showers, guilty of Murder in the first degree, the jury found the Defendant not guilty of Murder in the third degree. Due to the mandatory sentence of life imprisonment, defense counsel agreed to sentencing immediately after the verdict to enable the Defendant to proceed with Post-Sentencing Motions. On March 23, 1995, upon consideration of a Motion by the

Commonwealth, the Defendant's Post-Sentence Motions were denied by operation of law pursuant to Pa.R.Cr.P. 1410. [Footnote 1: Argument concerning the Post-Sentencing Motions was scheduled. However, due to factors, in particular, the Defendant's change of counsel, Argument did not occur.] On April 13, 1995, the Defendant, through new appellant counsel, filed an Appeal of our Order denying the Defendant's Post-Sentence Motions to the Superior Court of Pennsylvania. On April 18, 1995, the Court filed an Order pursuant to Pa.R.A.P. 1925(b), requesting from the Defendant a concise statement of matters complained of on appeal. The Defendant complied with the Order, filing a concise statement of matters complained of on appeal on May 4, 1995. This Opinion is submitted pursuant to Pa.R.A.P. 1925(a) without the benefit of briefs and argument of counsel.

The Defendant's concise statement of matters complained of on appeal contains thirteen general issues. We will address each issue separately, in the order that the issues were raised.

Motion in Arrest of Judgement

A. The evidence is insufficient, as a matter of law, to sustain the verdict of first-degree murder because the Commonwealth failed to prove beyond a reasonable doubt that Delbert Showers was murdered by the Defendant as opposed to having had committed suicide.

"The standard of review for the trial court as it passes upon a motion in arrest of judgment, is limited to a determination of the absence or presence of that quantum of evidence necessary to establish the elements of the crime. The trial court is required to view the evidence in the light most favorable to the Commonwealth, as

verdict winner, and may not alter the verdict based on a redetermination of credibility or a reevaluation of the evidence. Before granting an arrest of judgment, the trial court must find the evidence supporting the verdict to be so weak and inconclusive that a jury of reasonable persons would not have been satisfied as to the accused's guilt." Commonwealth v. Bigelow, 416 Pa.Super. 449, 611 A.2d 301, 303 (1992)(citations omitted).

A review of the case indicates sufficient evidence for each element of the crime of first degree murder was presented to the jury. A concise review of the evidence in the light most favorable to the Commonwealth follows.

The body of the deceased, Delbert Showers, was found on his couch containing the drug Serax, an anti-anxiety drug, and a lethal dose of Roxanol, liquid morphine.

The deceased obtained the Serax from a prescription written by Dr. Ina Gilmore a few years before his death. The deceased visited Dr. Gilmore more for anxiety than for depression. He made no comments to the Doctor concerning any suicidal feelings.

The Roxanol came from the house of Helen Wolfe, who possessed a prescription for the drug for the pain she suffered from due to cancer. The lethal Roxanol was surreptitiously taken from Helen Wolfe's Roxanol bottle and then the missing amount was replaced by water to cover up the removal.

The day the deceased died, the Defendant was the only other person in the house with the deceased. Only two logical possibilities were presented to the jury. First, the Defendant murdered the deceased by introducing a lethal dose of Serax into the deceased and then introducing a lethal

dose of morphine into the deceased. Second, the deceased committed suicide by self-ingesting the drugs. No other possibility was suggested to the jury and no other possibility appears realistic to the Court.

The Commonwealth introduced credible evidence concerning a motive for homicide by the Defendant. The deceased, at the time of his death, was involved in an affair with another woman, Sylvia Knecht. Sylvia Knecht was the sister of Helen Wolfe, a friend of both the deceased and the Defendant. Years earlier, the deceased was also involved in an affair with Helen Wolfe and there was testimony that the Defendant herself, had been involved in an affair with John Fred Wolfe, the husband of Helen Wolfe.

The Defendant insisted that she was unaware of whom the deceased was involved with in the affair at the time of his death. However, the Defendant sent her daughter,

Diane Showers, to drive to Sylvia Knecht's home to see if the deceased's vehicle was parked outside. The Defendant also [illegible] confronted the deceased concerning the affair and threatened to leave him over it.

A financial motive also existed. The Defendant was worth over $600,000.00. Yet, testimony was received that the deceased was "tight" with his money. He did not lavishly spend money on his wife or daughters. After Delbert Shower's [sic] death, the Defendant made phone calls to the deceased's life insurance company inquiring when she would receive the benefits.

The Defendant had ample opportunity to murder the deceased. In the weeks before Delbert Showers death, both Helen and John Fred Wolfe were away from their house for a few days. The Defendant possessed knowledge of this fact and would have been able to gain access to the Wolfe house to obtain the

Roxanol and replace it with water. The Defendant was the only person in the presence of the deceased both the night before and the morning and afternoon of the day the body was found.

The Defendant possessed the requisite knowledge to administer the drugs to the deceased without his awareness. The Defendant was a nurse, experienced in the administering of drugs. Additionally, the witness Bonnie Frey testified that in the past she had observed the Defendant participate in the drugging of the Delbert Showers [sic] so that he would pass out and the Defendant and her daughters would then go shopping.

In addition, the Defendant's own words and actions during the time of Delbert Showers' death, the police investigation, and the trial contributed to the verdict. Most important is the issue of the suicide

note. The Defendant's original story was that she awoke that day around 4:30 p.m. She came downstairs, glanced into the room where the deceased was lying in the couch, but continued to do things around the house, believing the deceased was only sleeping. At 5:30 P.M., she find the body, calls the deceased's brother and then calls 911. Later, the suicide note is found beneath the body. The deceased is dressed only in a torn pair of underwear, ripped so badly that his genitals are exposed.

During the beginning of the investigation, the Defendant identifies the writing of the note as that of her husband. The note, a document of over 200 words, is complex. It references the affair the deceased is involved in. It cross-references a note the Defendant allegedly wrote earlier in the morning concerning the Defendant being up part of the night,

vomiting. The note also states what drugs were taken and where the Roxanol originated. Of some importance, the note states that Helen Wolfe is unaware that the Roxanol was taken from her prescription.

For months the Defendant stuck to her story that the suicide note was written by the deceased. Finally, Trooper McBride confronted the Defendant with information from the State Police Crime Lab indicating that the deceased could not have written the note. Now the Defendant changes her story and admits she wrote the note. The version she presents at trial states that when she discovered that her husband was dead at 5:30 P.M. and found no suicide note, she was worried she would be suspected of murder. To allay those suspicions, she forged the suicide note. Without addressing at this point the credibility of this version, the Court is struck by the question of how, if

the Defendant, wrote the suicide note, she knew that her husband had taken the Roxanol from Helen Wolfe's home, without Helen Wolfe's knowledge. For all the Defendant knew, Helen Wolfe could have assisted the deceased in his suicide attempt. The Defendant never explained how she knew this fact and therefore inserted it into the suicide note.

The Defendant testified that she wrote the note between the time after she called 911 and before an incoming phone call was recorded. The Commonwealth was able to show that this time frame consisted of six minutes. A careful reading of the suicide note demonstrates that the note was not a simple farewell. As stated before, it references many topics, cross-references part of the Defendant's story about being ill the night before and in addition, the Defendant had to disguise her own

handwriting. All this occurred in six minutes. Additionally, within this six minutes the Defendant's version of the facts claim that she picked up empty Serax capsules from the floor and that she washed out the contained that had contained the Roxanol. Later, she would again change her story claiming the Roxanol container was a paper cup and she merely threw it away. She then folded the note, put it in an envelope and placed it under the 250 pound, dead body.

Other problems with the Defendant's version of the facts include the Defendant's consistent denial that she had received any other phone calls that day, other than a call from the deceased's brother. Not until the State Police confronted the Defendant with the phone records from that day did she recall a 14 minute phone call from her daughter during the afternoon.

When the brother called for the deceased during the day, the Defendant stated that the deceased was sleeping. However, the deceased was downstairs and the Defendant was upstairs. The Defendant could not have known if the deceased was sleeping or awake at that moment.

After the body was discovered, Trooper McBride made several searches of the Showers residence in order to find the container that was used to transport the Roxanol from the Wolfe home to the Showers home. The searches were unsuccessful. However, months later, the Defendant finds in a cupboard which Trooper McBridge had earlier searched, a coffee container that would have been sufficient to transport the Roxanol.

The Court believes there was ample evidence to establish the elements of first degree murder. We believe the jury's verdict to be correct. We find the

Defendant's claim of insufficient evidence to sustain the verdict to be without merit.

Motion for a New Trial

B. The verdict of first-degree murder was against the weight of the evidence which demonstrated that Delbert Showers had a long history of chronic depression, had been hospitalized and under medical treatment for it, had told several persons he intended to commit suicide shortly before his demise, was a high risk for suicide according to a forensic psychiatrist and in fact, had committed suicide.

A Defendant bears a heavy burden to sustain a Motion for New Trial on grounds that the verdict was against the weight of the evidence. Commonwealth v. Carlitz, 319 Pa.Super. 580, 466 A.2d 696, 699 (1983). A challenge that the verdict was against the weight of the evidence requires an assessment of the credibility of the

testimony offered by the Commonwealth. Commonwealth v. Brown, 538 Pa. 410, 648 A.2d 1177, 1191 (1994). Additionally a trial court's refusal to award a new trial based upon a claim of a verdict contrary to the weight of the evidence is "one of the least assailable of the trial court's rulings." Commonwealth v. Thompson, 538 Pa. 297, 648 A.2d 315, 324 (1994). Finally, to grant the motion, the trial court must find that the verdict is so contrary to the evidence as to shock one's sense of justice. Id. With these standards to guide us, we find the Defendant's Motion to be without merit.

The Commonwealth's witnesses appeared to the Court as credible, especially if one contrasts their testimony with the Defendant's witnesses. Unlike the Defendant's witnesses who either had an interest in the outcome of the trial or who changed their statements during the

investigation, the Commonwealth's witnesses were often neutral third party witnesses who consistently presented the same statements to investigators. In particular, the Commonwealth's expert witness dealing with the issue of whether the decedent suffered from chronic depression and committed suicide exhibited a greater degree of credibility than the Defendant's expert witness.

The Commonwealth's expert, Dr. Hume, attacked the theory of the defense expert Dr. Doyle concerning the likelihood of the deceased committing suicide. Dr. Doyle contended that the deceased suffered from atypical depression and that the deceased was in a class of people with a high probability of suicide. Dr. Hume countered that this theory was contrary to accepted scientific principles. Although the deceased was hospitalized over ten years

earlier due to the deceased being investigated by the F.B.I., because the deceased had remained free of depression symptoms since then, the deceased was not a high risk of suicide.

Dr. Hume noted that people who plan for the future are not those who commit suicide. The deceased was planning a trip to Canada as well as participating in boating, fishing, and work activities. In addition, the deceased was actively involved in assisting his son-in-law with stating [sic] a new business. Also, Dr. Doyle told the jury that the deceased was hospitalized for 31 days during his hospital stay ten years earlier, but failed to inform the jury that the deceased was able to let himself out of the hospital for 14 of those days.

The Defendant lacked credibility. As discussed above, her story on several points changed as new information became available.

She stated that she told the police about forging the suicide note in order to clear the situation. However, the testimony demonstrates that the Defendant only admitted to writing the suicide note after being told of the State Police Crime Lab results.

The Defendant claims she only wrote the suicide note in order to avoid being suspected of killing her husband. Yet, her other actions are inapposite. She threw away the Serax capsules and the Roxanol container that were allegedly next to the body. She never explained why she destroyed much of the evidence that indicated a suicide when her concerns were that no one would believe it was a suicide.

The Defendant told one insurance company that she wanted an autopsy done on her husband right away in order to clear any questions. Yet she told the coroner that

she did not want an autopsy done and in fact wrote a note (as if the deceased had written it) and placed it on the grave site of the deceased asking that an autopsy not be performed. Taken together with the evidence summarized in Section A, along with the lack of credibility of the defense witness, [sic] along with the credibility of the Commonwealth's witnesses, we find that the weight of the evidence sufficient to support the jury's finding of murder in the first degree.

C. The Trial Court erred in permitting the Commonwealth to call several character reputation witnesses to testify that the Defendant had a reputation for being untruthful when she did not place the truthfulness of her character into evidence; the testimony of said witnesses was based on knowledge of Defendant's reputation that was ten to fifteen years old and therefore

remote, irrelevant and prejudicial; and one witness improperly and prejudicially testified that the Defendant was fired from her nursing job and was not trusted by the hospital staff, which testimony was beyond the scope of character evidence.

When a Defendant in a criminal case takes the stand on their own behalf, they place their character for truthfulness at issue, the same as any other witness. Commonwealth v. Butler, 405 Pa. 36, 173 A.2d 468, 474, cert. den. 368 U.S. 945 (1961); Packel & Poulin, Pennsylvania Evidence § 608.1. The Defendant testified on her own behalf during the trial. Therefore, under Pennsylvania law the Defendant placed her reputation at issue. The Commonwealth may utilize rebuttal evidence for the purpose of affecting the credibility of the Defendant. Commonwealth v. Scoleri, 432 Pa. 571, 248 A.2d 295, 299 (1968).

The Defendant next argues that the witnesses' testimony was ten to fifteen years old and therefore remote and irrelevant. Although the extant [sic] of the witness' knowledge of the Defendant did extend back up to fifteen years, each of the rebuttal witnesses were acquainted with the Defendant in a more recent time period. Gloria Harbaugh based her testimony on events as recent as five years before the trial. Witnesses Diane Campbell and Michele Steinbacher based their testimony on events nine years ago.

Our Supreme Court has stated that "prior reputation for veracity is evidence for the jury's consideration." Butler, 173 A.2d at 474 (emphasis added). We would note that convictions up to ten years old are utilized to impeach the credibility of a witness. Therefore, because our Supreme Court permits prior reputation for

truthfulness for the purpose of impeachment, ten years appears to be a proper cut off point. All the witnesses on this issue were aware of the Defendant's reputation for truthfulness within the previous ten years. The Court found this testimony to be relevant at the trial. Even if the witnesses' awareness of the Defendant's reputation is considered too remote, the rebuttal witnesses on this issue were brief and any error would not constitute grounds for a new trial.

Next, the Defendant argues that one of the rebuttal witnesses testified that the Defendant was fired from her nursing job and was not trusted by the nursing staff. When the witness Michele Steinbacher testified that the Defendant was not trusted by the staff, she was responding to a question from the Commonwealth concerning the Defendant's reputation for honesty in the community.

Defendant counsel immediately objected to the witness's supplementary response and the Court sustained the objection ordering a more specific answer to the question.

Finally, the witness Michelle Steinbacher was called for two purposes. First, to rebut testimony of the Defendant concerning the reason for her separation from employment from the hospital and to testify concerning the Defendant's reputation for veracity. The testimony concerning the Defendant being fired from her employment was offered to rebut earlier testimony and was not concerned with the issue of reputation. We find the Defendant's issues in this area to be without merit.

D. The Trial Court erred when it allowed the Commonwealth to introduce evidence that Diane Showers, the daughter of the Defendant and the deceased, had given

medication to Delbert Showers several years before his death, which testimony was irrelevant, remote and highly prejudicial to the defense.

The evidence concerning Diane Showers administering medication to the deceased several years before his death constitutes relevant evidence. The testimony of Bonnie Frey, a friend of the family, related that the Defendant would instruct the daughter, Diane, to place medication into the deceased's coffee. The deceased would be unaware he was being drugged. After the drug took effect, the deceased would fall asleep and the daughter and the Defendant would sometimes go shopping.

This testimony demonstrates past conduct by the Defendant evincing knowledge of a method to incapacitate the deceased by slipping medication into his beverage. Evidence demonstrating an accused's behavior

toward the deceased constitutes admissible evidence to show prior course of conduct toward the deceased. Commonwealth v. Badman, 398 Pa. Super. 315, 580 A.2d 1367, 1371 (1990). The testimony concerning the Defendant's instructions and oversight of the daughter drugging the deceased demonstrates a likely method by which the Defendant administered the Serax and Roxanol to the deceased. This testimony was neither irrelevant nor remote.

E. The Trial Court erred when it permitted the Commonwealth to grant use immunity to Diane Showers for a limited purpose when the grant was given solely in order to impeach her testimony by that of a later Commonwealth witness, Janette Andrews, and it further erred by allowing the prosecutor to cross examine Diane Showers as a hostile witness, limiting defense counsel's cross examination to matters that

were granted in the use immunity, and failing to compel the Commonwealth to give use immunity for all testimony from Diane Showers or preclude her from testifying because she invoked her right against self-incrimination.

Initially, we note that a Defendant lacks standing to contest the granting of use immunity to a Commonwealth witness. United States v. Clemons, 658 F.Supp. 1116, 1119, (1987), aff'd, 843 F.2d 741, cert. den., 488 U.S. 835 (1988); Commonwealth v. Daniels, 280 Pa.Super. 278, 421 A.2d 721, 726 (1980).

Notwithstanding the above case law, the Defendant argues that the Court granted limited use immunity solely to enable the Commonwealth to impeach the testimony of the Defendant's daughter, Diane Showers, by another witness. This charge is baseless in that the witness had refused to testify at

the preliminary hearing invoking her constitutional right against self-incrimination. The witness testified in chambers to the Court that she also intended to invoke her constitutional right during the trial. The Court granted limited use immunity for the purpose of allowing the witness to testify concerning events which the Commonwealth had received information. The Commonwealth possessed no knowledge as to what the witness would testify. When the witness testified to the event in a different version than Janette Andrews had relayed to the Commonwealth, the Commonwealth put Janette Andrews on the stand to present a different version of the event. Because the witness refused to cooperate with the police the Commonwealth was unaware as to the testimony of Diane Showers and therefore the Defendant's allegations as to the Commonwealth's motive

is baseless.

Next, the Defendant alleges the Court erred when it allowed the Commonwealth to cross-examine the witness. "It is well-settled that the use of leading questions is largely within the discretion of the trial court, particularly where in a criminal trial the Commonwealth witness is an associate of the defendant and reluctant to testify. . . ." Commonwealth v. Settles, 442 Pa. 159, 275 A.2d 61, 63 (1971). In Settles, the witness was the sister-in-law of the Defendant and had lived with the Defendant for over four years. This established the witness as an associate of the Defendant. In the instant case, the witness had lived with the Defendant all her life. The witness clearly was an associate of the Defendant. By the witness refusing to testify, she meets the test that the witness was reluctant to testify. Cross-

examination by the Commonwealth was proper in this situation.

Lastly, the Defendant argues that the Court erred in limiting defense counsel's cross-examination to the issue relevant to the limited use immunity. A trial court possesses broad discretion to determine the scope of cross-examination. Commonwealth v. Lane, 533 Pa. 276, 621 A.2d 566, 568 (1993). "Ordinarily, cross-examination is limited to matters brought out on direct examination. . . ." Commonwealth v. Cheatham, 429 Pa. 198, 239 A.2d 293, 296 (1968).

The limited use immunity granted by the Court restricted the Commonwealth's scope of direct testimony concerning the witness Diane Showers. The Court utilized it's [sic] discretion to limit the defense cross-examination to the same events that the Commonwealth was limited to during the direct examination.

F. The Trial Court erred in allowing Janette Andrews to testify when she was called for the exclusive reason of impeaching Diane Shower and her testimony, which was hearsay, went beyond the scope of the offer of proof and the grant of immunity, thereby prejudicing the Defendant.

As discussed above, the Commonwealth was unaware of the exact nature of Diane Showers' testimony due to her previous refusal to testify and her lack of cooperation with investigators. After Diane Showers testified, relating the incident in a different manner than Janette Andrews had previously related the incident, Janette Andrews was called to the stand. Ms. Andrews related a different version of the incident. The Commonwealth did not plan to use the testimony of Janette Andrews to attack the credibility of Diane Showers. The Commonwealth only put Janette Andrews on

the stand after Diane Showers testified to a different version of the facts than the Commonwealth expected.

Near the end of Janette Andrews' testimony, the Court permitted the witness to testify concerning how Diane Showers called the witness a few weeks before the trial to state that their stories did not match. The Defendant objected that this testimony was hearsay and beyond the scope of the offer of proof and the grant of immunity. The Court permitted this area of Janette Andrews' testimony for impeachment purposes, thus hearsay evidence was permissible. The testimony was not outside the offer of proof or the grant of immunity because the conversation held a few weeks before the trial concerned the incident which both witnesses testified to at the trial.

G. The Trial Court erred in refusing

to grant a mistrial after the affiant testified that he felt that there was a reasonable doubt that the death of Delbert Showers was a suicide, which was an improper opinion, invaded the province of the jury, and had the effect of rendering the personal belief that the Defendant was guilty.

The affiant, Trooper McBride, stated during his testimony that he felt that during his investigation of the death of Delbert Showers, he reached a point where he believed there was reasonable doubt that the death was a suicide. Defense counsel immediately moved for a mistrial. The witness did not use the term reasonable doubt in connection with homicide. Nor did the Commonwealth purposely elicit the term "reasonable doubt" from the witness.

"[T]he remedy of a mistrial is an extreme one and the motion for such relief is addressed to the sound discretion of the

court. . . . A mistrial is required only when an incident is of such a nature that is unavoidable effect is to deprive the [Defendant] of a fair and impartial trial." Commonwealth v. Montgomery, 533 Pa. 491, 626 A.2d 109, 112-3 (1993). In Commonwealth v. Harris, 297 Pa.Super. 308, 443 A.2d 851, 854 (1982), a police officer on the stand testified as to how the evidence "stacked up against" the Defendant. Defense counsel objected and moved for a mistrial. The comment was not solicited by the Commonwealth. The Court denied the mistrial and instructed the jury to disregard the comment. Our Superior Court upheld the actions of the trial court.

In the present case, the comment of the Trooper was not solicited by the Commonwealth. The Court immediately instructed the jury that the term "reasonable doubt" is a legal term of art

and witnesses in a legal proceeding are not allowed to use the term so as not to cause confusion. The Court warned the witness to refrain from using a legal term during his testimony. Additionally, during the close of the trial, the Court instructed the jury as to the correct legal definition of the term "reasonable doubt."

H. The Trial Court erred in permitting Janet Dangle and Richard Stahl to testify when they had violated the sequestration order by being present in the courtroom during the trial and which testimony was inadmissible hearsay.

The Court issued a sequestration order concerning potential witnesses. Richard Stahl testified as a Commonwealth witness. After his testimony he apparently heard parts of the testimony of two other witnesses. At the time, the Commonwealth did not anticipate recalling the witness.

At the close of the Defense, the Commonwealth called Richard Stahl as a rebuttal witness. His testimony consisted of rebuttal testimony to statements made by other witnesses concerning alleged statement he had made. The Court ruled that the witness' brief exposure to testimony after his own testimony did not violate the sequestration order.

The Commonwealth never listed Janet Dangle as a witness. She attended various parts of the trial. She was called by the Commonwealth as a rebuttal witness because her sister, Helen Wolfe, testified that from the beginning of the investigation Mrs. Wolfe had told Trooper McBride that the deceased was suicidal. The witness, Janet Dangle, testified that after Delbert Showers death, Helen Wolfe in fact stated that she could not understand why the deceased would kill himself.

The Court ruled that since Janet Dangle was never listed as a witness, she was not subject to the sequestration order. Before the Commonwealth called her as a witness, the Commonwealth informed the Court that the witness had heard the testimony for which she was called as a rebuttal witness. The Court found no violation of the sequestration order concerning this witness.

I. The prosecutor committed misconduct in his closing argument by accusing the Defendant of failing to inform the affiant of her hospital stay during the first interview, which was contrary to the evidence, and by wrongly informing the jury that the defense had not proven anything, which impermissibly shifted the burden of proof to the Defendant in the collective mind of the jury.

"It is axiomatic that in reviewing the prosecutor's remarks, we must consider the

entire context of his summation." Commonwealth v. Thompson, 538 Pa. 297, 648 A.2d 315, 322 (1994). During the Commonwealth's closing, the District Attorney made reference that the Defendant did not tell Trooper McBride, during their first interview, about the deceased being hospitalized at Williamsport Hospital. The defense objected claiming this statement was a mischaracterization of the evidence. However, a review of the transcript demonstrates that Trooper McBride testified that during the first interview, the Defendant never mentioned the Williamsport Hospital stay. The record only reflects that the Defendant told Trooper McBride that the deceased was treated ten years earlier for depression. The Court fails to see any mischaracterization of the testimony by the Commonwealth during the closing argument. Additionally, the Court instructed the jury

that it was their recollection of the facts and not how the attorneys recalled the facts.

The Defendant also argues that the Commonwealth committed misconduct by stating that the defense had not proven anything, thereby shifting the burden of proof. During the Commonwealth's closing argument the District Attorney through numerous examples spoke concerning the Commonwealth's burden of proof. However, towards the end of the closing argument, the District Attorney did ask the jury whether the Defendant had met that burden. The defense counsel immediately moved for a mistrial. During sidebar, it was apparent that the District Attorney was unaware he had stated that the Defendant had the burden of proof. It appeared to the Court that the District Attorney had merely misspoke. The Court denied the motion for a mistrial. When the

Commonwealth resumed the closing argument, the District Attorney went to great lengths to reiterate that it was the Commonwealth who possessed the burden of proof, correcting any possible confusion on the part of the jury. Additionally, the Court during its instructions to the jury clearly stated whose responsibility it was to meet the burden of proof in a criminal case. We found the Commonwealth's misstatement, at the end of a more than two hour closing argument, to constitute an unintentional, unknowing mistake that was amply corrected by both the Commonwealth and the Court.

J. Trial Counsel was constitutionally ineffective for failing to conduct any meaningful cross-examination of Dr. John Hume, the Commonwealth's expert psychiatrist, who opined that Delbert Showers was not a suicide risk, which testimony directly contradicted the defense

theory that Mr. Showers committed suicide and the defense forensic psychiatrist's opinion that he definitely was a high suicide risk.

"Before a claim of ineffectiveness can be sustained, it must be determined that, in light of all the alternatives available to counsel, the strategy actually employed was so unreasonable that no competent lawyer would have chosen it. We inquire whether counsel made an informed choice, which at the time the decision was made reasonably could have been considered to advance and protect defendant's interests. Thus, counsel's assistance is deemed constitutionally effective once we are able to conclude the particular course chosen by counsel had some reasonable basis to effectuate his client's interests. The test is not whether other alternatives were more reasonable, employing a hindsight evaluation

of the record." Commonwealth v. Thuy, 424 Pa.Super. 482, 623 A.2d 327, 330 (1993), citing Commonwealth v. Dunbar, 503 Pa. 590, 470 A.2d 74, 77 (1983) (citations omitted).

The Commonwealth's witness, Dr. Hume, was a strong, credible witness for the Commonwealth. Defense counsel was faced with two choices. Either partake in a long, drawn out cross-examination, probably allowing the witness to restate his positions for a second time, or conduct a short, concise cross-examination, making a few points and getting the witness off the stand. We will not second guess his strategy and do not find that the strategy was so unreasonable that no competent attorney would employ it. Defense counsel is well respected as a competent defense attorney and we are convinced that he made an informed choice as to how to conduct his cross-examination of this witness.

K. Trial counsel was constitutionally ineffective for failing to ask for a jury instruction on voluntary manslaughter, which charge was supported by the evidence, and the Trial court erred in not delivering said charge on its own.

Counsel will not be held ineffective for failure to pursue a meritless claim. Commonwealth v. Davis, 313 Pa.Super. 355, 459 A.2d 1267, 1272 (1983). Our Superior Court has addressed the issue of the lack of a jury instruction on voluntary manslaughter during a homicide trial. In Commonwealth v. Haynes, 395 Pa.Super. 392, 577 A.2d 564, 574 (1990), alloc.den. 527 Pa. 598, 589 A.2d 689 (1991), Superior Court held that when no evidence is presented during the trial to support a charge of voluntary manslaughter, and additionally the Defendant never made an issue of any of the elements of voluntary manslaughter, and the Defendant claimed he

did not kill the victim, "it is proper to omit a charge of voluntary manslaughter."

The Defendant consistently claimed that the deceased died as the result of suicide. No evidence remotely suggesting a heat of passion homicide was introduced. Therefore, a charge of voluntary manslaughter would have been inappropriate.

Additionally, in Haynes, Superior Court found the absence of this jury instruction harmless. Id. When a trial court instructs on first, second, and third degree murder, the jury possesses the ability to exercise its mercy dispensing power. Id. In the instant case, the jury was instructed on first and third degree murder (second degree murder being non-applicable). The jury exercised its authority by finding the Defendant guilty of first degree murder and not guilty of third degree murder.

The Defendant possessed no right to

have the jury charged concerning voluntary manslaughter. Defense counsel cannot be held ineffective for his failure to request the instruction.

L. The Trial court erred in permitting the prosecutor to cross-examine the defense forensic psychiatrist as to a report that Delbert Showers had caught the Defendant having an affair with one Mr. Styers in 1975/1976, which line of questioning was irrelevant, remote and highly prejudicial to the Defendant.

A trial court possess broad discretion to determine the scope of cross-examination. Commonwealth v. Lane, 533 Pa. 276, 621 A.2d 566, 568 (1993). The witness testified he had access to the police reports. The witness testified that the deceased's depressive episodes were triggered by significant events. The witness also testified that the deceased may have been

susceptible to an event triggered by an affair and that he was possessive of his wife, the Defendant, Judy Showers. The Court found that a question concerning why finding his wife involved in an affair with a friend was not a triggering event for a depressive episode. This question attacked one of the basic premises of the expert's theory. It was proper to allow the Commonwealth to ask why this event did not figure within the witness' theory.

M. The Trial Court erred in refusing Defendant's request for a change of venue or venire, although pre-trial publicity was inflammatory and inherently prejudicial, and there was an insufficient "cooling off" period between the date of the Defendant's arrest and the trial.

The burden of proof for demonstrating prejudice concerning a motion for a change of venue lies with the movant. Commonwealth

v. Bachert, 499 Pa. 398, 453 A.2d 931, 936 (1982). The Defendant failed to meet this burden. Although pre-trial publicity did occur, it neither was so sensational, inflammatory or slanted toward conviction for the Court to find the publicity was prejudicial. Commonwealth v. Pursell, 508 Pa. 212, 495 A.2d 183, 187 (1985). The pre-trial publicity primarily occurred during the time of the Defendant's arrest and during the time of the Preliminary Hearing. These events occurred nearly a year before the actual trial permitting a significant "cooling off" period.

The Court denied the Defendant's Omnibus Pre-Trial Motion for a change of Venue/Venire due to a lack of actual prejudice shown on the part of all available potential jurors. The Court ruled that the Defendant could renew the Motion when actual prejudice on the part of all available

potential jurors could be shown. The Defendant was never able to produce the required level of proof.

For all of the foregoing reasons, the Jury verdict and Sentence of this Court should be sustained on appeal to the Superior Court.

Date: 9/12/95

/s/
Barry F. Feudale, J.